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(Winnipeg Centre)
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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	**APPEARANCES:**
HER MAJESTY THE QUEEN,	Michael Himmelman for the Crown
- and -	
TASHA DORA LAQUETTE, Accused.	Martin Glazer for the Accused
	Judgment delivered: May 12, 2021

MARTIN, J.

INTRODUCTION & ISSUE

[1] Tasha Laquette is charged with second-degree murder for a 2019 homicide in Winnipeg. On September 5, 2019, she was granted judicial interim release. For reasons not relevant to this decision, the original bail order was terminated and replaced with another bail order. Accordingly, she was released to a well-regarded residential bail supervision and treatment center, Behavioural Health Foundation, on condition that she reside there. Within a few months, Ms. Laquette apparently

absconded the facility, thus breaching her bail order. She was later arrested and remains in custody awaiting trial.

[2] After her arrest, the Crown moved to vacate, or revoke, her bail order. Ms. Laquette did not oppose this. The Crown also sought to have her bail noted, or endorsed, in default. To this she objected, asserting the bail order could not be noted in default unless she was first convicted of breaching the bail order. At that point she had been charged with failing to comply with a condition of her release contrary to s. 145(5)(a) of the *Criminal Code*, but her trial had not taken place; she had not been convicted.

[3] Thus, the issue is narrow. On a s. 770 application, is a conviction for breaching a recognizance necessary for the noting of default? Or, in other words, is it a condition precedent to noting a recognizance in default that the accused admit, or be convicted of, breaching the recognizance? As will be seen, the ready and simple answer is "no". Section 770 is the first step, a procedural step, that sets up a forfeiture proceeding under s. 771 where the substantive issues are fully determined. However, given the state of some jurisprudence, and for clarity in Manitoba at least, a more complete but concise analysis may be beneficial. For convenience, I will use the terms "judge" and "justice" interchangeably.

BACKGROUND

Statutory Scheme

[4] The scheme for judicial interim release and enforcement of undertakings, release orders and recognizances (collectively "bail orders"), is circumscribed by the *Criminal*

Code, but its application and practice varies across Provincial jurisdictions. Historically, for civil or criminal litigation, within permissible limits, many provinces/territories have developed their own rules and conventions.

[5] Part XXV of the *Criminal Code* sets out the relevant statutory provisions dealing with the effect and enforcement of bail orders. Notably, s. 770 states:

> 770 (1) If, in proceedings to which this Act applies, a person who is subject to an undertaking, release order or recognizance does not comply with any of its conditions, a court, provincial court judge or justice having knowledge of the facts shall endorse or cause to be endorsed on the undertaking, release order or recognizance a certificate in Form 33 setting out
>
> a) the nature of the default;
>
> b) the reason for the default, if it is known;
>
> c) whether the ends of justice have been defeated or delayed by reason of the default; and
>
> d) the names and addresses of the principal and sureties.
>
> (2) …
>
> (3) A certificate that has been endorsed on the undertaking, release order or recognizance is evidence of the default to which it relates.
>
> (4) …
>
> (emphasis added)

After default is noted, certain other procedures follow.

[6] Specifically, s. 771 requires a judge, on request of certain persons, to fix a time and place for the hearing of an application - - an estreatal, estreatment or forfeiture hearing - - for forfeiture of the amount of bail monies set out in the bail order noted in default. Each accused and surety will receive notice of the hearing, and will be given the opportunity to show cause why the bail monies should not be forfeited. After submissions from the Crown, the accused, and any affected surety, the judge will make a determination to grant or refuse the application, and make any order with respect to

the amount of forfeiture the judge considers proper. If a forfeiture order is made, the person subject of the order becomes a judgment debtor of the Crown in the amount the judge orders them to pay. The forfeiture is a civil procedure, albeit by s. 773, an order of imprisonment may be made against a surety for failure to satisfy the debt.

How the Scheme Works in Manitoba

[7] Typically, in Manitoba, where the Crown has reason to believe an accused has breached their bail order, the Crown will have the matter brought onto a court docket. As in the case here, two events usually take place; first the Crown moves to revoke the bail order and, second, they ask for the bail order to be noted in default under s. 770. For both events, most often the Crown orally explains the circumstances or allegations to the judge, not dissimilar to a show cause hearing for an original bail application. By and large, the summary is sufficient for the judge to grant the application, but not always.

[8] Three points of clarification. First, in Manitoba, a bail hearing, a bail revocation hearing or a request to note default for breach of a bail order are typically not done with oral or affidavit evidence; the Crown puts forward a summary narrative based on its reports. Second, depending on the timing and circumstances, the accused may not be before the court. For example, if they have absconded, they likely would not be before the court. Alternately, if an accused is arrested for another offence while on bail, they likely will be present. Third, there are many permutations of fact situations underlying allegations respecting breached bail conditions. This simple reality must be

rationalized, or accounted for, in any coherent analysis of how s. 770 operates, as the section makes no distinction between different kinds of breaches.

[9] In this case, because the charge is under the exclusive jurisdiction of the Court of Queen's Bench, and the Court had a scheduled motions appearance list, the Crown filed both a written application to vacate, or revoke, the bail order, and an affidavit of a legal assistant, setting out the circumstances. The affidavit attached the recognizance, specifying that Ms. Laquette had breached the residency condition of her recognizance by absconding, and attached a copy of an unsworn information charging her with breach of her bail order. Ms. Laquette had already been located and arrested, and therefore, she was present. As noted, defence counsel did not object to the bail order being vacated, but did object to default being noted on the recognizance. The Crown's reason for vacating the bail, and for default being noted, was the same; Ms. Laquette absconded.

The Parties Positions

[10] As noted, the defence asserts a default under s. 770 cannot be endorsed before the guilt of the accused, for breaching a condition of the bail order, has been determined by such a charge. They argue the operative words of s. 770(1), "having knowledge of the facts" (of noncompliance or breach), must mean or be equal to a finding of guilt because, counsel says "facts" must mean proven facts, i.e. a conviction.

[11] The Crown says the jurisprudence is clear; a conviction breach of a bail order is neither necessary nor a prerequisite to noting of default under s. 770. Moreover, s. 770 is the first step of the default process, which by design has other safeguards to ensure

an accused and surety are dealt with judicially, and fairly, in accordance with the statute/law.

ANALYSIS

[12] The default provisions for breach of bail orders is one component of an overall bail system and should, to every extent possible, be inherently harmonious with that system. Further, as explained by Justice Gary T. Trotter in *The Law of Bail in Canada,* 3rd ed. (Toronto: Thomson Reuters, 2020) (looseleaf) at page 13-3:

> … it is important to recognize that, while the law technically characterizes forfeiture proceedings as "criminal" in nature, there are distinct non-criminal threads running through this area of the law. The forfeiture hearing itself is essentially an inquiry into whether the accused or the surety should be relieved from forfeiture. Indeed, when forfeiture is ordered it results in the creation of a civil debt. …

[13] Several observations inform the meaning of the key phrase, or test, in s. 770(1) of the judge "having knowledge of the facts":

i. the central components of the bail system, including adjudicating the initial bail application (s. 515) and revoking bail if necessary (s. 524), are carried out on information to satisfy the judge on a balance of probabilities standard. The standard of proof for a criminal conviction, of beyond a reasonable doubt, does not apply to the bail provisions. There is no reason, in policy or in the wording of s. 770, to consider proof of default to be a more stringent or higher standard than for other bail issues. It is illogical to infer that a criminal conviction for a breach is necessary to establish a breach on a civil standard;

ii. as noted by Trotter at pg. 13.5, "There is no provision for notice to the accused, nor does the section contemplate that evidence need be adduced to establish "the facts." This conclusion coincides with Manitoba practice; particularly that neither sworn testimony, nor affidavit evidence, is required. Our practice of relying on the Crown's submission of the facts they have been informed of, is appropriate and sufficient for s. 770 purposes;

iii. in many situations where an accused has fled or has not appeared for a court appearance, and hence breached the bail order, a trial for a breach charge may not be possible, as the offender is missing, until arrested at some unknown point. It makes no sense that a forfeiture, or estreatal, proceeding would have to be indefinitely postponed until their apprehension, if ever. Moreover, for various legitimate and pragmatic reasons, the Crown may not proceed with a breach prosecution at all. Again, it also makes no sense that they should be compelled to do so in order to initiate default proceedings where a bail order has presumptively been breached.

In any scenario, the inability to enforce the bail order defeats a fundamental theory of the bail system -- the acknowledgment by an accused or surety of a debt to the Crown, if the accused breaches, is meant to dissuade an accused from breaching their bail. If not enforced, there is little point to it. As Crown counsel stated, the bail would have no teeth;

iv. the plain language of s. 770 does not speak to, or require, proof of conviction of a breach as either necessary or a precondition. If Parliament

had intended such, the language of the section could easily have reflected that by saying, for example, "upon conviction for breaching a bail order, default shall be endorsed on the bail order";

v. the effect of endorsing or noting default on the bail order by Form 33, is a rebuttable presumption that a breach has occurred; it is not a conclusive determination. Section 770(3) merely states the endorsement is "evidence of the default". The ***Interpretation Act*** R.S.C., 1985 c. I-21, specifies at s. 25(1):

> Where an enactment provides that a document is evidence of a fact without anything in the context to indicate that the document is conclusive evidence, then, in any judicial proceedings, the document is admissible in evidence and the fact is deemed to be established in the absence of any evidence to the contrary.

Case authorities are consistent that endorsing default at the first stage, s. 770, is no more than a rebuttable presumption of default; and

vi. at the next stage, the s. 771 estreatal hearing, the accused and surety have the opportunity to address, or refute, the breach allegation, as well as, the consequences of a default if the justice determines a breach occurred. They may do so, with or without counsel's assistance.

For these reasons, the judge's determination of a default, that he has "knowledge of the facts" of noncompliance, is not premised on, or equivalent to, knowledge of a conviction for breaching the bail order.

[14] This conclusion accords with, arguably prevailing, jurisprudence. For example, in:

- ***R. v. Bal***, 2014 MBQB 48, the court upheld forfeiture of a $10,000 recognizance and cash bail of $50,000 where Mr. Bal was acquitted on a charge of breaching his bail (for failing to appear in court), many months after the initial estreatal hearing. The Court recognized that a notation, or endorsement of default, was rebuttable. On an application for fresh evidence, Mr. Bal failed to adequately explain how he missed his court date or why he remained on warrant status, and failed to provide a transcript of the reasons for his acquittal. Further, the court found Mr. Bal chose not to attend the estreatal hearing, where, if meritorious, he could have refuted the default finding. The justice concluded that, "[t]he absence of a failing to appear charge … would in no way have affected the validity of the forfeiture granted at the estreatal proceeding…"; (para 51)
- ***R. v. Mignacca***, [2008] OJ No. 2880, the court held there was "no useful purpose" by requiring default only be endorsed after conviction for failing to comply with recognizance. The accused or surety has the opportunity in the estreatal proceeding to prove the bail was not properly estreated, in other words, to refute the s. 770 determination of default. (para 22)
- ***Purves v. Canada (Attorney General)***, 1990 CanLII 903 (BCCA), the court held that a stay of proceeding of a breach of recognizance charge "does not preclude forfeiture proceedings from taking place" for a breach made prior to the entry of the stay.

[15] Having noted these cases, there are precedents where, in all the circumstances, and absent a conviction for a breach of recognizance, the court refused to endorse default under s. 770. Two cases are notable.

[16] First, in ***R. v. Parsons***, [1997] N.J. No. 337 (NLCA), Green J.A., found grounds to believe Mr. Parsons had breached his bail order by committing a new indictable offence. The Justice cancelled his recognizance, but released him on a new bail order. The Crown also asked for default to be endorsed pursuant to s. 770. Green J.A. refused, noting that a s. 770 finding of default was discretionary, but the discretion was narrow. In the end, he expressly noted he had not made a finding of fact a breach occurred, even though there were grounds to believe it had, and he did not "consider it appropriate at this stage and under the present circumstances" to determine if "in fact a default has occurred." (para 38) What were the present circumstances?

[17] In exercising his discretion, Green J.A. considered: (i) "the manner in which the issue arises and the degree of involvement of the sureties", adding (ii) "especially so where, as here, the issue is raised, … for the ulterior purpose of trying to disable the accused" from putting up cash for a new bail, by initiating forfeiture proceedings on the old bail; and, (iii) opined that a conviction for a breach of recognizance would be "relevant to determining whether another court at an earlier stage should declare a default." (para 37).

[18] Viewed in its entirety, given the nature of the alleged breach, the nature of the s. 770 application and the "ulterior purpose" of the application, Green J. A. exercised a limited discretion that he was not satisfied of the "facts". He surmised a conviction for

breaching the bail would be "relevant", but did not express it was necessary or a prerequisite to triggering s. 770.

[19] Second, in ***R. v. Dallaire***, [2001] O.J. No. 140 (ONCA), Laskin J.A. refused to note default under s. 770 where an accused was alleged to have breached his bail by engaging in financial transactions. Laskin J.A. revoked his bail, but given Mr. Dallaire's position that he did not breach his bail order, he concluded the s. 770 application was "premature" and should wait for a related breach charge to be tried. He noted that unlike the revocation application, there was no urgency to the forfeiture proceedings. Laskin J.A.'s comments, as succinct as they were, have caused some to conclude a s. 770 application should wait for a related breach conviction.

[20] In both cases, the s. 770 default issue was dealt with relatively summarily by both Justices on a chambers application, at the end of a more comprehensive bail revocation discussion. Each justice recognized a narrow and limited discretion to refuse to note default given the totality of the circumstances before them on the specific application, where they were not satisfied they had sufficient knowledge of the facts showing a breach. Respectfully, neither case stands for the proposition that a conviction for breach of recognizance is necessary or a precondition to noting default under s. 770.

[21] It should be clearly understood that the limited discretion the judge has in a s. 770 application is related only to assessing knowledge of the facts of a noncompliance. Once satisfied of the facts of noncompliance or a breach, no further

discretion remains: default must be noted. A wider discretion remains at the next stage under s. 771.

SUMMARY OF s. 770

[22] To summarize, the principles required for a s. 770 application to note default of a recognizance are:

- consistent with the rules or convention of the court, (i) the application may be made on written or oral application, without notice to the accused or a surety, and (ii) oral or affidavit evidence need not be led; the Crown's summary narrative of their information is adequate;
- endorsing default is not a rubber stamp process. Rather, a judge has a narrow and limited discretion. If the judge is satisfied, on a balance of probabilities, that they have knowledge of the facts of a breach of the bail order, the judge *must* endorse, or note default, in the manner prescribed by the *Criminal Code.* Alternatively, considering all of the material and information, if they are not satisfied or if they do not have knowledge of the fact of a breach, they should decline to endorse default, without prejudice to the Crown to bring another s. 770 application as circumstances evolve or as new information becomes available;
- in any context, a related conviction for breaching the bail order at issue is not necessary, or a precondition, in order to be satisfied, or to have knowledge of facts, of noncompliance with a bail condition for the purpose of noting default and completion of Form 33; and,

- these principles apply to any allegation or type of breach of a condition of undertakings, release orders and recognizances. There is no distinction, or different test, for different types of noncompliance, whether for example, failure to appear assertions, new criminal charges, or any other permutation of a breach allegation.

[23] The s. 770 application is simply the first stage of a two-stage process for enforcement of bail orders through forfeiture. Nothing herein alters the requirements of the next stage, as set out in s. 771, including safeguards to ensure forfeiture of pledged property is in keeping with the rules of natural justice, that it is fair and not capricious or haphazard.

CONCLUSION

[24] A finding after trial or plea of Ms. Laquette's breach of recognizance is not necessary for me to rule respecting the s. 770 application.

[25] I am satisfied, based on the Crown's submission, I have knowledge of facts respecting a breach of a condition of Ms. Laquette's bail order of failing to reside at the Behavioural Health Foundation. As such, default must be endorsed on the recognizance. Another judge may determine the estreatal or forfeiture under a s. 771 proceeding in the normal course.

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Martin, J.